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I Don't Want to Play God—A Response to Professor Tremblay

Cover Page Footnote

Assistant Professor of Law and Director of Clinical Programs, Southern New England School of Law. I am grateful for comments on an earlier draft of this essay offered by Griffin Stockley, Mary Helen McNeal, David Prentiss, Matthew Diller, and Katherine Hessler. I also appreciate Professor Tremblay's review of the Article.

I DON'T WANT TO PLAY GOD—A RESPONSE TO PROFESSOR TREMBLAY

Justine A. Dunlap*

INTRODUCTION

IN *Acting "A Very Moral Type of God": Triage Among Poor Clients*,¹ an article in this Symposium issue, Professor Paul R. Tremblay argues for the need for triage in the selection of legal services² cases and clients and suggests a formula for making those triage decisions. While many of Professor Tremblay's views are unassailable, there is a part of me that rejects absolutely his hierarchy of case selection. In this musing on Professor Tremblay's meditation,³ I attempt to sort out the basis for my strong reaction to some of his points.⁴ I join others who have rejected a system of triage,⁵ but my reaction also surely stems from my years of lawyering on behalf of those who lacked the funds to retain counsel.⁶

I respond first to Professor Tremblay's views on the goal of legal services, taking issue with his premise that the only permissible goal of a poverty law practice is empowerment rather than access to the legal system.⁷ Then, after musing about "weighted triage"⁸ and, inevitably

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1. Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 *Fordham L. Rev.* 2475 (1999).

2. Tremblay and I both use the phrase "legal services" broadly to encompass poverty law offices not funded by Legal Services Corporation monies.

3. Tremblay calls his paper a "meditation" rather than a "polemic." *Id.* at 2475. In that same spirit, I consider this response a musing rather than a rebuttal.

4. It is with trepidation and humility that I undertake the task of criticizing Professor Tremblay's article. It was not so very long ago that he was the leader of my small group at an AALS clinical conference. As a new clinical teacher, I was both comforted and awed by his wisdom, concern for students, skills of clinical supervision, and gentle nature. So it is with great respect that I take issue with some of the positions that he asserts.

5. See Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 *N.C. L. Rev.* 282 (1982); Arthur R. Matthews, Jr. & Jonathan A. Weiss, *What Can Be Done: A Neighborhood Lawyer's Credo*, 47 *B.U. L. Rev.* 231 (1967).

6. Legal aid work—either civil or criminal—was the reason I entered law school. As an undergraduate student, I interned in a public defender's office and my two legal jobs in law school were both in legal aid offices. From June of 1982 through October of 1986, I worked as a staff attorney and managing attorney at the Legal Aid Society of the District of Columbia. Thereafter, from 1989 through 1995, I worked as a court-appointed lawyer in child abuse and neglect cases.

7. This debate has raged for years, although often the various goals have cohabited happily. The early days of federal assistance for legal services for the poor refer to both access to the civil legal system and the eradication of poverty as the goals of legal services, without any apparent sense of conflict. See Alan W. Houseman, *Legal*

perhaps, about what gets weighed rather than whether anything gets weighed, I turn to consider Professor Tremblay's position on "who decides" how the scarce legal resources are allocated.⁹ Although Tremblay acknowledges the importance of community input, he rejects the notion that the community's views on the type of cases or clients to select should be dispositive. His position troubles me on several counts, which I explore more fully within. First, it violates the concept of client autonomy or client centeredness.¹⁰ Further, it devalues the input that results from meaningful community collaboration.

This reflection is primarily in response to Professor Tremblay's article. His article, however, was integral to the discussion of the working group on client/matter/case selection at the Fordham Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues and, to the extent the comments of that group amplify either Professor Tremblay's article or my response thereto, I will refer to them. Not all points of Professor Tremblay's article were addressed, either in detail or, in some instances, even cursorily. I shall be so bold, however, as to comment upon some of the group's recommendations in light of what Professor Tremblay posits. These musings about Tremblay's article should be understood, however, as exclusively my views—and tentative ones at that—not those of my small group.

The conference had eight working groups, each assigned a particular topic and charged with making recommendations concerning that topic.¹¹ Both Professor Tremblay and I were in the fourth group¹² and our topic was client/matter/case selection.¹³ Our process of considera-

Services: Has It Succeeded? 1 D.C. L. Rev. 97, 98 (1992) [hereinafter Houseman, *Legal Services*]; *infra* Part II.

8. "Weighted triage" is Tremblay's term. Tremblay, *supra* note 1, at 2484-85.

9. *Id.* at 2524.

10. See David A. Binder et al., *Lawyers as Counselors: A Client-Centered Approach* (1991); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 Md. L. Rev. 213 (1991). Client autonomy and client-centeredness are not, of course, synonymous, but they are related concepts. Client-centeredness has been described as a means to protecting client autonomy. See Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 Va. L. Rev. 1103, 1128 (1992).

11. For a description of the conference, see Bruce A. Green, *Foreword: Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients*, 67 Fordham L. Rev. 1713, 1729-37 (1999).

12. The group's other participants were Matthew Diller, Toby Golick, Donald B. Hilliker, Brian Lawlor, Peter Margulies, Janet Sabel, Nancy Strohl, John Tull, and Michael S. Wald. Our group was aided in notetaking by Rebecca Marek, a student at Fordham University School of Law.

13. The other topics were: rendering legal assistance to similarly situated individuals; use of nonlawyers; limited legal assistance; influence of third parties on the lawyer-client relationship; representation by private lawyers; representation within law school settings; and assessment of systems for delivering legal services.

tion and debate¹⁴ was greatly enhanced by his article, written especially for the conference, although the discussion, of course, was not bounded by the article. As I read the article in preparation for the conference, I was surprised to find myself in disagreement with Professor Tremblay on numerous points. I was thus primed for debate.

I. THE DEBATE PREMISE—AN “OCEAN OF LEGAL NEEDS”¹⁵

Professor Tremblay and I agree on the premise that renders this conversation relevant. There are too many clients in need of legal services and too few lawyers who are willing to serve them. Whether there are too many clients to be served by available lawyers—without regard to the penury of the client—is another question entirely, and one which I will not undertake to address in detail here. Some posit that this scarcity is wholly artificial and results from lack of political will to adequately fund a legal services program for the poor.¹⁶ Whatever the reason, both Tremblay and I take it as present reality that there is more demand for legal services on behalf of poor persons than there is the ability—or the social will—to provide.¹⁷

He and I would both surely welcome the day when the notion of allocating scarce resources is antiquated. Interestingly enough, however, one of the more contentious points at the Fordham conference revolved around the phrase “100% access,” a concept that seemed to be rejected by most. To be sure, its rejection was not a repudiation of 100% access being desirable, but rather an acknowledgment—perhaps cynical or perhaps merely coldly realistic—that, in view of the retrenchment on legal services provision from the federal level,¹⁸ 100% access was not going to happen any time soon and that our collective time, energy, and grey matter were better spent dealing with the reali-

14. As a strong proponent of the value of both collaboration and process, I find discussions such as these fascinating—even those parts that are occasionally frustrating. We were capably guided by our group leader, Professor Matthew Diller of Fordham University School of Law, and quite fortunate to have a rather diverse group within the confines of those invited to the conference. Further, our group was dominated by none and contributed to by all, thus heightening the odds of a constructive and representative group work product at the figurative end of the day. That happy confluence notwithstanding, collaboration is a difficult concept that I wrestle with in Part V.

15. Tremblay uses this evocative phrase. See Tremblay, *supra* note 1, at 2481.

16. See Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 Ohio St. L.J. 1, 12-13 (1984). In view of the large pool of lawyers nationwide, it is likely that if the legal profession took seriously the preamble of the Model Rules of Professional Conduct regarding its obligation to devote pro bono time on behalf of the poor, legal resources would be plentiful. See Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 Fordham L. Rev. 2415, 2415 (1999).

17. See Tremblay, *supra* note 1, at 2479-80.

18. For a discussion of the federal resources allocated to legal services, see Tremblay, *supra* note 1, at 2480-81.

ties of the current situation.¹⁹ The concern that full access might be achieved in name only or through the extreme dilution of legal services was also voiced.

I would like to note here a curious development that occurred in our group. Despite general agreement that there are too few lawyers for the poor, my group proposed, and had adopted by the conference, the recommendation that the income guideline restrictions required by Legal Services Corporation,²⁰ and employed voluntarily or otherwise by a host of other legal services providers,²¹ be re-examined.²² What accounts for this recommendation? After declaring that there is a paucity of legal resources to meet the ocean of legal need, why would we decide to seek out more clients? The view was articulated that an inflexible financial cut-off worked profound injustices against clients who had serious legal problems and no more resources for lawyers than those who fell within the guidelines.²³

As a proponent of this recommendation, I was buoyed by its approval, as I believe it may open access to legal services to those who are poor but, due to the dint of their hard work, have raised themselves marginally above the income guidelines.²⁴ I recognize, however, that the expansion of the pool of clients without a correlative

19. For a suggestion of how to achieve 100% access using different avenues of representation resulting in "justice roll[ing] down like waters, and righteousness like an ever-flowing stream," see Talbot "Sandy" D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 25 Fla. St. U. L. Rev. 631, 634 (1998) (quoting *Amos* 5:24). Federal legal services money is only one of the eight tributaries in D'Alemberte's vision. Perhaps Tremblay, I, and others would be well-advised to work to achieve full access rather than fold our hands and figure out how to split up meager lawyer resources, a point Tremblay makes himself. See Tremblay, *supra* note 1, at 2478. The idea of full access also got a nod from Attorney General Janet Reno during remarks made at the Annual Meeting of the American Association of Law Schools, January 9, 1999. She suggested achieving full access through the use of community advocates. The use of community advocates to assist unrepresented persons is also seen elsewhere. See Mary Helen McNeal, *Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance*, 67 Fordham L. Rev. 2617, 2640 n.110 (1999).

20. See 45 C.F.R. § 1611.3 (1997).

21. Under Massachusetts Student Practice Rules, hundreds of students annually represent indigent clients in law school clinical programs. Indigent is defined elsewhere by statute to mean 125% of federal poverty guidelines. See Mass. Gen. Laws ch. 261, § 27A (1992). At the Legal Aid Society of the District of Columbia, a non-LSC funded program, we also used the federal poverty guidelines to screen for financial eligibility for legal services.

22. See *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 Fordham L. Rev. 1751, Recommendation 74, at 1779 (1999) [hereinafter *Recommendations*].

23. Indeed, perhaps it is essentially the same client base, with people hovering around the poverty level, sometimes falling under, sometimes over. I thank Professor Matthew Diller for this insight.

24. Tremblay would likely disagree with this rationale, arguing that it credits social worth as means by which to select clients. See Tremblay, *supra* note 1, at 2495-97. I suggest, however, only that a poor person's earnings ought not operate to divest her of legal services. The relevance of social worth (of the person as well as the cause)

expansion of lawyers willing to represent those clients exacerbates the scarcity issue and increases the need for a system by which one allocates inadequate resources. Of course, the proposition that many people unable to squeeze within the legal services income guidelines deserve representation is hardly novel.²⁵ Further, this recommendation is consistent with Tremblay's article, wherein he rejects using relative degrees of poverty as a criterion for accepting or refusing clients who otherwise fall within income guidelines.²⁶

II. THE GOAL OF LEGAL SERVICES—ACCESS OR EMPOWERMENT?

Any discussion of case and client selection and what factors, if any, ought to be considered must first address the goal of providing legal services, as that goal will necessarily influence the factors considered in any triage determination.²⁷ Is access the goal? Tremblay says no.²⁸ He argues against access as a sufficient basis upon which to choose a client or case; a nice tertiary benefit, perhaps, for a client to have had represented access to the system, but not, standing alone, grounds to take a case. The goal, Tremblay asserts, is achieving or enhancing power for clients.²⁹ Access is only valuable as a symbol of power, he argues, and "has no meaningful worth except as such,"³⁰ although he concedes that others disagree.³¹

Notwithstanding the certitude with which he asserts it, I disagree with Tremblay's view that access cannot be the goal of a legal services

generated significant discussion in our small group and is worthy of far more consideration than I can accord it here.

25. See Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 Geo. L.J. 1529, 1536 (1995); Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 Geo. L.J. 1669, 1706 (1995) [hereinafter Houseman, *Political Lessons*].

26. See Tremblay, *supra* note 1, at 2493-94. He suggests that there is no reason why a poorer family should benefit from legal services than "a comparable family, still poor, but with greater income." *Id.* at 2494.

27. The debate over goals continues. See *supra* note 7. Houseman suggests a nice merging of different goals or visions. See Houseman, *Political Lessons*, *supra* note 24, at 1705-06. After declaring that legal services cannot end poverty, he proposes a vision under which legal services programs help "economically deprived communities solve the problems they face." *Id.* at 1706.

28. See Tremblay, *supra* note 1, at 2508-09. I am unsure whether Tremblay is arguing that access is *not* the goal or whether he is merely saying it *should not* be the goal. Although I would disagree with him on both counts, I think he is demonstrably wrong if his point is the former not the latter. Indeed, Richard McMahon, Executive Director of the New Center for Legal Advocacy, an LSC-funded office, recently described the mission of legal services as "equal access to justice." Interview by Kate Grossman, Reporter, Providence Journal with Richard McMahon, Executive Director, New Center for Legal Advocacy, New Bedford, Mass. (Feb. 1, 1999).

29. See Tremblay, *supra* note 1, at 2509.

30. *Id.*

31. *Id.* at 2508-09. For favorable assessments of access as an appropriate goal, see Breger, *supra* note 5, at 287, 347; Failing & May, *supra* note 16, at 20-22.

office. If it is, as he suggests, about enhancing political power,³² it is hard to conceive that, on a very practical level, all—or even most—cases of representation are about enhancing political power.³³ I think that Tremblay correctly identifies the access versus empowerment debate, but I believe it is too early to declare that empowerment is the victor.³⁴

Why isn't access a valid goal in its own right? As a legal aid lawyer, performing what Tremblay calls individual case representation or service cases,³⁵ I was proud to help clients have their "day in court." In a system where disputes are often resolved through the courts, and where the value of having a lawyer assist in navigating the judicial system is self-evident,³⁶ access seems to be an obviously desirable goal. The downsides to access are obvious: it is arguably not achievable; sometimes it is not clear what exactly we are trying to "access"; sometimes it is all too clear that we are trying to access a highly flawed, unjust, and impenetrable system; and, finally, the biggest drawback to access as a goal may well be its modest nature, when contrasted with the grander notions of empowerment or the eradication of poverty.

On the other hand, the benefits of access are obvious, too. For individual clients with individual problems, providing legal services with the goal of providing access is likely to be a sufficient goal. Furthermore, as Tremblay points out, it is easier to achieve the goal of access than it is to succeed with goals of impact representation.³⁷

32. See Tremblay, *supra* note 1, at 2509.

33. The discussion of many of these issues must be further divided into categories of macro or micro-allocation, terms which Tremblay uses throughout his Article. These terms are not self-defining and, indeed, used in the literature to refer to different things. The terms as defined by our conference group are used as follows: the macro-allocations were issues needing consideration system-wide. We did not further refine "system," but it was clear from our discussion that the macro-allocation issues were multi-program considerations. Indeed, our recommendations finally refer to them as "delivery systems." *Recommendations*, *supra* note 22, at 1778. Micro-allocations, on the other hand, were considerations within a particular legal services program, and finally were called "program priorities" in our recommendations. *Id.*

34. It may well be that Houseman's vision would satisfy both Tremblay and me. See *supra* note 27. Helping disadvantaged communities solve problems might be considered empowerment, thus satisfying Tremblay and, if done properly, might further satisfy my goal of equal access. For a further discussion of the competing views of poverty law work, see Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. Rev. 474, 486-492 (1985). Abel points out nicely some of the problems with both views.

35. See Tremblay, *supra* note 1, at 2500.

36. The current trend to establish pro se clinics to help clients represent themselves more adequately does not undercut this point, but rather highlights the need to make special efforts to make the justice system accessible; thus, when a lawyer is not available, there are "clinics" or informational packets or kiosks, or any number of other techniques used to assist the layperson "access" justice.

37. See Tremblay, *supra* note 1, at 2511-12. Tremblay makes this point in regard to the tentative nature of mobilization lawyering juxtaposed to individual case representation, but it applies with similar force here. I fully agree with Tremblay's assessment

III. IS TRIAGE A GOOD IDEA (OR SIMPLY AN INEVITABLE ONE)?

If I reject the notion of triage, how would I select cases and clients?³⁸ Would I want a first-come, first-served model? Or a lottery system? While at first blush these satisfy because of their egalitarian flavor,³⁹ serious consideration makes me realize that these options are deficient.⁴⁰ I cannot seriously assert that a poor client with a fence dispute or who wants a name change ought to have the same random chance of getting a lawyer as a client who is about to be evicted or who is a victim of domestic violence.⁴¹

Having thought through and become troubled by my first reaction, I contemplated the basis for it.⁴² Why am I so against picking and choosing among clients? On this point, I am grateful to the insight of my small group colleagues who, in a discussion at one of the breaks, helped me uncover one possible explanation. My primary lawyering for more than ten years of practice was representing parents and children in child abuse and neglect cases.⁴³ Then, as a clinical instructor at the University of Arkansas at Little Rock School of Law, students and I represented clients in a mental health law clinic. These clients had, by legislative fiat, a "right" to my services. I performed no triage,

about the tentative nature of impact litigation. Indeed, my views in favor of access are no doubt influenced by having been on the sidelines of "successful" class action litigation where, even years later, the fruits of success were unrealized.

38. For a different theory by which to select clients, see Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 Geo. L.J. 2665 (1993). Ellmann argues for an ethic of care in lawyering and explores how a lawyer using an ethic of care would choose which clients to represent. See *id.* at 2682-93. His discussion takes place in the context of private law practice, not legal services, and thus involves lawyers with greater freedom in selecting clients.

39. It is worthy of note that Tremblay subtitles a portion of his triage section "Justifying a Non-Egalitarian Solution." See Tremblay, *supra* note 1, at +10. His use of language here suggests some discomfort with the concept of selecting clients in a non-egalitarian manner.

40. For a discussion of why a lottery or other random selection means does not necessarily enhance equality or manifest a concern for human dignity, see Failing & May, *supra* note 16, at 22-24.

41. Although I find his phrasing a bit dismissive, I probably am willing to concede one of Tremblay's opening thoughts: that the concept of triage is not seriously open to question and the tough questions revolve around what gets weighed in a triage determination. See Tremblay, *supra* note 1, at 2476. That I ultimately find myself at the place where Tremblay starts renders my gut negative reaction to his position more intriguing and in need of probing. I say this in part because I believe my reaction is shared by others, thus suggesting that further consideration of this visceral negative reaction might be productive.

42. Even Breger, see *supra* note 5, would permit clients who have legal emergencies to jump the queue, a concession that Tremblay notes. See Tremblay, *supra* note 1, at 2488.

43. That I was potentially engaging in a positional conflict under the Rules of Professional Conduct was, sadly, a thought that never occurred to me. It now has and I may have been. See Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 Fordham L. Rev. 2339, 2352 (1999).

accepting my clients and their causes without further analysis. Thus, the very notion of triage is foreign to me. Upon consideration, though, I was representing clients where weighted triage had already occurred. In a system of scarce resources, I was involved in civil cases where a legislature⁴⁴ had weighed the interests at stake and determined that there was a right to court-appointed counsel. Triage of some sort had thus occurred before my entrance on the scene.⁴⁵

Having recognized the reality if not the wisdom of triage, I continue to struggle with the need to pick from among clients, all of whom assert a need for legal counsel. I find myself resonating to the "neighborhood lawyer's credo" used by Tremblay in his title—albeit, with a significant alteration. In their credo, Matthews and Weiss proposed the following:

Cases cannot be selected according to a scheme established by a poverty program or by any other group. Traditionally, the lawyer is not bound to accept all comers, but these comers could find other lawyers willing to take their fee. The poor cannot shop for lawyers or find others. . . . Advocates must work with the materials presented to them by clients. *To reject clients whose cases do not seem to make the legal points sought to win some social revolution, that they lack the social impact desired by a theoretician, however well intentioned, who holds a position on an advisory board, is to play a very immoral type of god.* Even assuming that a lawyer can know what is good for the poor in general as opposed to the client sitting across his desk, to reject people is to alienate them not only individually but also as a group.⁴⁶

44. A right to a lawyer in a host of civil cases has been rejected oftentimes as a constitutional matter. See Breger, *supra* note 5, at 290-91. Thus, to the extent my clients had these rights, they had been afforded by legislative action. See, e.g., Ark. Code Ann. § 20-47-212 (Michie 1987) (appointing counsel for the mentally ill); D.C. Code Ann. § 16-2304 (1981) (granting right to counsel for children and parents in child neglect proceedings).

45. Further considerations about my practice revealed more about my discomfort with triage. First, as a legal aid managing attorney responsible for assigning cases to staff attorneys, I developed a reputation for being "hard-hearted," meaning in this context that I was not susceptible to pleas—no matter how compelling—to take on additional clients when our intake plate was full. On one hand, perhaps I did not have the same degree of "rescue mission" that Tremblay identifies as a problem for many legal services offices. Tremblay, *supra* note 1, at 2478, 2517-19. Or I may have been acutely aware of the need to cap caseloads in order to provide competent representation. But perhaps I had implicitly adopted and was living by a first-come, first-served model of intake. Second, in my role as director of the Counsel for Child Abuse and Neglect, I was responsible for appointing counsel in cases where triage had been done by the legislature. However, I was often in the position of trying to find lawyers to represent clients for whom the legislature (or city council, since this was the District of Columbia) had decreed counsel was not necessary. Thus, I was already rejecting the notion of triage—a belief then inchoate—and attempting to implement the goal of equal access by procuring counsel for everyone in the case, not only those whose cause the council had designated as worthy.

46. Matthews & Weiss, *supra* note 5, at 241-42 (emphasis added). This credo suggests that to reject a client because her case is not weighty enough not only denies

It is this notion of playing God, identified by Matthews and Weiss and picked up by Tremblay, that troubles me. As lawyers are incredibly powerful persons in any event, though, why do I balk so at the power involved in selecting cases or clients?⁴⁷ A primary reason comes to mind. It seems to me that this picking and choosing among clients and cases sets up a bit of a double standard. We, as a poverty law community, have wailed and lamented over the restrictions placed on programs receiving Legal Services Corporation funding, decrying the immorality of the categorical exclusion of certain types of cases. Why is it any better, then, for us to be the ones to set the limits?⁴⁸ Are we the "moral" gods of Tremblay's meditation and they the "immoral" gods of Matthews and Weiss? In fairness to Tremblay, I believe he would argue that his triage factors explicitly *do not* embrace the kind of political considerations that seem to undergird the LSC restrictions.⁴⁹ Nonetheless, I see no way around the following reality: someone is claiming a corner on the truth, with the concomitant right to make choices to effectuate that truth.

Notwithstanding my discomfort with triage, I have conceded that it occurs. That being the case, where do I stand with regard to the factors that Tremblay sets out for use in triage decisions? Under his system, several factors are taken into consideration, while others are excluded from consideration.⁵⁰ Tremblay would use the following fac-

that client access, but also disempowers the group, thus contravening Tremblay's goal of empowerment.

47. Indeed, as Director of Clinical Programs at Southern New England School of Law, part of my responsibilities include the planning and creation of specific clinics. Thus, I am without a doubt involved in selecting clients and case matter. A mantra of clinical legal education, though, is fulfilling "unmet legal needs." As I interpret this phrase, it is about access and only incidentally about empowerment. I do not know whether this phrase has a shared meaning among clinicians. Further, as a clinical law teacher, I have a primary obligation to my students to ensure that the types of cases and clients that I select will be educationally instructive. So in a sense, I can dodge some of the debate by retreating behind pedagogical value. But I can surely attest that the days spent with my working group at the Fordham Conference were far from an academic exercise for me. Inherent in our discussion were tools to help me assess the kinds of clinics that I want to establish at Southern New England School of Law.

48. Setting limits on the ways in which the poor receive legal services is a time-honored, if not honorable, practice. Beginning in the dawn before legal services, "legal aid" societies—as opposed to "legal services" offices—provided legal assistance based on a sense of charitable obligation, rather than any concept of a right to legal assistance. In some circumstances, litigation was actively discouraged, in others, particular kinds of cases, e.g., divorces, were considered luxuries and thus excluded. For a discussion of the historical antecedents of legal services, see Houseman, *Legal Services*, *supra* note 7. In some ways, the current discussion of triage parallels those early discussions: how are we—as the professionals—going to decide which cases of the poor we will select and bestow with our expertise?

49. See 45 C.F.R. § 1626 (1997) (restricting LSC attorneys from providing legal assistance to non-eligible aliens); *id.* § 1633 (restricting LSC attorneys from defending persons charged with, or convicted of, illegal drug activities, in certain public housing eviction proceedings).

50. See Tremblay, *supra* note 1, at 2490-93.

tors: (1) the principle of legal success—whether having a lawyer would make a difference in the case; (2) the principle of collective benefit—whether the benefit will extend beyond the actual client; (3) the principle of attending to the most serious matters;⁵¹ and (4) the principle of favoring long-term benefit over short-term relief.

To a certain extent, my earlier assessment that access, not empowerment, is the goal⁵² truncates this discussion, as Tremblay's factors are clearly focused on maximizing the benefit of the provision of legal services.⁵³ Even with access as the goal, I would probably agree to give priority to serious matters,⁵⁴ Tremblay's third factor. Although this suffers from problems regarding client autonomy and community input,⁵⁵ on balance it is less flawed than random access.

My greatest concern with Tremblay's triage factors centers around those which he would exclude. He argues that the decision about what kinds of cases to take ought not be influenced by constituent demand.⁵⁶ Tremblay concedes that this is a troubling principle, giving rise to concerns about lawyer-domination, but he nonetheless maintains its validity. Although I appreciate his candid struggle, suggesting that a program must "simultaneously respect the needs of its constituents but sometimes resist their demands"⁵⁷ is to reduce constituents to children.

After years of lawyers assuming the role of beneficent, all-knowing professionals, making the decisions that they felt were best for clients, the concept of client-centeredness has gained steady ground and for good reason.⁵⁸ The notion that it is the client, not the lawyer, who must live with the decisions and consequences of the case and therefore must be the person who makes the decisions seems, at this day

51. Defined by Tremblay as the "level of pain, discomfort, or harm associated with the legal matter if left unresolved." *Id.* at 2492.

52. See *supra* note 7 and accompanying text.

53. Tremblay himself agrees that his triage factors are "superfluous" if the goal is access, not empowerment. Tremblay, *supra* note 1, at 2509.

54. Accepting this as a permissible factor then requires a further debate over what constitutes a "serious matter." Then one must further consider various cases that might not be considered serious, but that either go to quality of life issues—such as family cases—or could be considered preventative—such as credit issues. Tremblay also recognizes the slippery slope here: a bad credit rating left unresolved could turn into a more serious problem. See *id.* at 2492 n.77.

55. See *infra* Parts IV, V.

56. See Tremblay, *supra* note 1, at 2497.

57. *Id.*

58. See Binder et al., *supra* note 10. The principles of client-centered counseling and client autonomy are certainly predominant themes in several corners, including clinical legal education and legal scholarship. For a discussion and comparison of paternalistic versus client autonomy-based versions of lawyering, see Simon, *supra* note 10, at 222-26. Simon concludes that the "refined" versions of each theory have more similarities than is generally acknowledged. *Id.* at 224.

and age to this lawyer, an entirely unassailable proposition.⁵⁹ Further, the idea that this is so not just for theoretically pure reasons of client autonomy but because a client actually might have some insight into the solution of her own problems, although perhaps more threatening to the professionals involved, seems equally right. Its currency as acceptable legal thinking is supported by the Model Rules of Professional Conduct, which indicate that even on matters historically within the lawyer's domain, the lawyer ought to consult with the client.⁶⁰ Thus, when lawyers finally have begun to return power to clients, I regret that Tremblay's theory appears to reclaim it with the assertion that we know best what kind of cases and clients, among the poor, are entitled to representation.

Tremblay has excluded this factor of constituent domination because of his concern that the community may demand legal services for cases not justified by other triage factors.⁶¹ Triage is not, he asserts, a "fundamentally democratic endeavor."⁶² First, I do not share Tremblay's concern that the client community will make, as a general rule, demands for inappropriate kinds of representation.⁶³ For this discussion, however, let us take the hard case and assume it does. It is our right, as competent adults, to make choices that cannot be gain-said by others.⁶⁴ This cannot be, as a theoretical or moral matter, any less true for poor persons. To be sure, persons without financial means lack the ability to effectuate the same kinds of choices that those of us with adequate resources can make. Further, when choices involve the allocation of scarce resources, "bad" choices are harder to justify. Why is it, however, up to the lawyers rather than the community to judge the choices? Isn't it rather audacious to assume that we can judge what is best for our clients—or potential clients?⁶⁵ If pov-

59. Tremblay is sensitive to the criticism of lawyer domination of clients, but ultimately concludes that the criticism is not an impediment to excluding constituent demand as an appropriate triage factor. See Tremblay, *supra* note 1, at 2497.

60. See Model Rules of Professional Conduct Rule 1.2(a) cmt. (1998); see also William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. Miami L. Rev. 1099, 1104-06 (1994) (discussing the tension between helping clients and avoiding the domination of clients).

61. A legal services office's automatic responsiveness to "uninformed" client demand has been criticized before. See Houseman, *Political Lessons*, *supra* note 24, at 1684.

62. Tremblay, *supra* note 1, at 2497.

63. I am not certain that Tremblay believes that this will occur on a routine basis either, as he writes that the empirical data to support this claim "may be open to debate." *Id.*

64. See *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).

65. In his essay on representing Ms. Jones, William Simon discusses the difficulty in trying to understand the needs, views, and wants of a client whose life experience is wholly different from one's own. See Simon, *supra* note 10, at 221. This problem is amplified when trying to do so on the macro-allocation level that Tremblay suggests.

erty lawyering is, as Tremblay asserts, about enhancing empowerment for the client community,⁶⁶ what could be more empowering than having that very same community make the decisions.

IV. WHO DECIDES?

The discussion of the merits of denying the community the ability to influence triage foreshadows Tremblay's discussion of who decides, assuming that there is some sort of weighted triage, what is weighed and what it weighs: Tremblay concludes, "reluctantly but confidently,"⁶⁷ that it is ultimately the program staff who must make the discretionary decisions about case selection.⁶⁸ He knows this will be a controversial assertion, as it runs counter to the view that a client/community-based decisionmaking process is desirable.⁶⁹

I take exception to having the program staff decide on case selection for many of the same reasons that I object to rejecting constituent demand as a permissible factor in determining case/client selection: it devalues the wisdom of clients and the community. Not only is this troubling in its own right, I think it points up a contradiction in Tremblay's argument. He asserts that the goal of a poverty law program is empowerment of its constituents, which he defines as "the collection of persons within the community who could ask for help now or in the future."⁷⁰ Assuming *arguendo* that empowerment—rather than "mere" access—is the goal, divesting the community of the power to choose what kinds of cases and clients the lawyers available to it will handle seems to directly contravene that principle.⁷¹

I am confident that this is not Tremblay's intent. He offers two reasons to reject having the client population decide what cases and clients to accept.⁷² First, he cites to the logistical problems, which he deems "readily apparent."⁷³ Second, and more significantly, Tremblay posits a "trustee function" for poverty lawyers. He suggests that poverty lawyers have an obligation to the client community—including future generations of clients.⁷⁴ It is this responsibility to future clients that, according to Tremblay, precludes a model of client decisionmak-

66. See Tremblay, *supra* note 1, at 2508.

67. *Id.* at 2532.

68. See *id.* at 2524-28.

69. See *id.* at 2525.

70. *Id.* at 2509.

71. Others have called it an exertion of oppressive power. See Simon, *supra* note 59, at 1107.

72. See Tremblay, *supra* note 1, at 2526-27.

73. *Id.* at 2527. I am not persuaded that difficulties in logistics are a sufficient reason to reject the client community as the proper decisionmaker. For a discussion about the inherent challenges in securing community input, see *infra* Part V.

74. See Tremblay, *supra* note 1, at 2509-11. Tremblay is not alone in taking the view that decisions about what cases and clients to represent may permissibly consider the impact on the broader "disadvantaged" community. See Ellmann, *supra* note 10, at 1144.

ing. Only the program staff can perform the proper fiduciary responsibility mandated by the trustee function.⁷⁵

Although this theory is intriguing, ultimately it creates more problems than it solves.⁷⁶ If I understand it correctly—and it does seem consistent with his case selection principle that collective benefit trumps individual benefit—Tremblay's position is that the lawyer's obligation to the community is greater than her obligation to the individual client. How can that ever rest consistently alongside the bed-rock principle of client loyalty and the obligation to represent one's client zealously?⁷⁷ Of course, the facile reply is that this discussion implicates client selection, not ethical obligations to current clients.⁷⁸ In deciding whether to take new cases, however, the needs of existing clients are always an issue, as Tremblay readily acknowledges.⁷⁹

V. DIFFICULTY OF COLLABORATION

My final musing focuses on a tension that I observed in at least two places: Tremblay's article and our small group discussion. The tension exists between the value and utter necessity of community input and control versus the difficulty inherent in getting that input in a meaningful and accurate fashion.

Tremblay understands this tension, as he warns against abdicating the trustee function of the poverty lawyer by giving in to constituent demand,⁸⁰ yet he fully acknowledges the importance of community demand.⁸¹ Our small group also struggled with this issue. Several in the group who were part of organizations where community input was routinely solicited, through either membership on boards or otherwise, remarked upon the difficulty of having such input be meaningful.

There are diverse reasons for this perceived⁸² difficulty. First, there is always the concern that the community members or leaders be truly representative of the community. Second, the planned interaction between a professional service provider and the community may be

75. See Tremblay, *supra* note 1, at 2527-28.

76. The notion of trustee is inherently paternalistic and I cannot accept poverty as a basis by which to divest one of decisionmaking capacity.

77. See Model Rules of Professional Conduct Rules 1.7 cmt., 1.3 cmt. (1998).

78. Indeed, Tremblay argues that ongoing clients generally take precedence over new clients. See Tremblay, *supra* note 1, at 2521-24. But there are occasions where he would permit the abandonment of current clients for the needs of future clients. See *id.* at 2523.

79. See *id.* at 2524.

80. See *id.* at 2527-28.

81. See *id.*

82. I use "perceived" not to contest the validity of the sentiment but merely to underscore that the comments were made by the professionals rather than the community members involved in these endeavors and thus necessarily reflect only one side of the equation. I suspect, however, that it is quite likely that, if polled, community members would also express some dissatisfaction with the ways in which their voices are heard and incorporated.

stilted and artificial, with predictably inadequate results. After all, board meetings, even among homogenous participants, are not often remembered for facilitating fruitful teamwork. Third, there may be a profound lack of relationship and trust between the two groups, further complicating the goal of meaningful collaboration.⁸³

At least some of these reasons surfaced in our group discussion about the limitations and values of community participation in the process of case matter and client selection. The discussion led to recommendations, adopted by the conference, that were aimed at enhancing community involvement and input.⁸⁴ Recommendation Seventy in particular focuses on the obligation to get meaningful community input.

It states:

Programs have an affirmative responsibility to set goals and priorities through a process of consultation with the client community and to periodically reassess the decisions made.

- (a) Programs have an affirmative responsibility to ensure that the process of consultation is meaningful and effective.
- (b) Meaningful consultation requires an ongoing dialogue with the community through many information sources including both formal and informal community interaction. Advisory boards and surveys should not be the principal means of obtaining community input.
- (c) In order to receive meaningful input from the community, programs must collect and disseminate information that would help community members to understand and evaluate the program's goals, priorities, and effectiveness.⁸⁵

I would also like to make a passing comment on Recommendation Seventy-two, even though it does not speak directly to community collaboration. It provides: "Programs should give serious consideration to the goal of assisting institutions and community groups in promoting activities that increase economic stability and growth in the communities that they serve."⁸⁶

This seemingly innocent recommendation packs quite a wallop. Obscured nicely here is the notion of "mobilization lawyering."⁸⁷

83. Distrust is a predictable consequence of removing decisionmaking power from the community, another basis on which to criticize Tremblay's position. For a discussion of the special challenges in securing group trust, see Ellmann, *supra* note 10, at 1135-39.

84. See *Recommendations*, *supra* note 22, Recommendations 68-75, at 1778-79.

85. *Id.* Recommendation 70, at 1779.

86. *Id.* Recommendation 72, at 1779.

87. Tremblay, *supra* note 1, at 2502. Mobilization lawyering is Tremblay's terminology for what is variously called rebellious, critical, or political lawyering. See Feldman, *supra* note 25 (political lawyering); Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 Geo. L.J. 1603, 1608 (1989) (rebellious lawyering); Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. Pub. Int. L.J. 49, 50 (1991) (critical lawyering).

This concept is one of Tremblay's practice visions, the other three of which are: individual case representation; focused case representation; and law reform.⁸⁸ Tremblay recommends that a poverty law program maintain a balanced portfolio of these different types of practice visions. This recommendation of practice visions and balanced portfolios was one of the numerous ideas in Tremblay's article that got short shrift in our discussion group, resulting solely from the lack of time. Recommendation Seventy-two, however, was our attempt in the conference's waning moments to acknowledge the critical importance of mobilization lawyering. Reconfigured in Tremblay's article and in our group to encompass some form of community development work,⁸⁹ there was a sense within the group that this practice vision was not appropriate to every legal services program, hence the precatory wording.

These recommendations are significant because they mandate a search for ways to make community input meaningful and valuable. Lip service to the value of community collaboration is not enough. We have an obligation to make it real, a proposition with which I believe Tremblay would agree.

But therein lies the rub: meaningful collaboration and input is almost always difficult to secure. That was underscored for me in a rather ironic way, as our group experienced some of the frustrations of collaboration even as we discussed its merits for the organizations we were there to support and guide. The challenge is to permit everyone to make a contribution—even when that requires the prompting of some and the gentle muzzling of others—and then to create a process in which constructive and honest debate can occur. There is a season for everything, however, and debate must end so decisions can be made and carried out. If consensus is the goal, stridency at both ends of the spectrum is muted, with both negative and positive effects. If consensus is not the goal, there is always a risk that a dissenter or

88. See Tremblay, *supra* note 1, at 2500-2502. As a legal aid lawyer, then staff attorney, and director of a program making appointments for child abuse representations, I have had some involvement in three of the four practice visions: all except mobilization lawyering. A recurrent theme in poverty law literature is the tension that sometimes occurs between lawyers and programs which practice and adhere to only one of the practice visions. See Failinger & May, *supra* note 16, at 14-17; Houseman, *Political Lessons*, *supra* note 25, at 1688-90. My own exposure to the schism came by way of an early legal aid boss who, when I innocently conflated poverty law—i.e., individual case representation—with public interest law, barked: "Poverty law is where you help poor people with their problems, public interest law is where 'do-gooder' lawyers sit around and get rich." Public interest lawyering also generally encompasses clients—individually or as groups—who might get omitted from the poverty lawyer's client list, i.e., clients with environmental or consumer problems. See Ellmann, *supra* note 10, at 1105 n.9.

89. The importance of community development work or mobilization lawyering, though hardly new, seems to be enjoying new attention. Indeed, Fordham Law School recently sponsored a symposium on that issue. See Symposium, *Lawyering for Poor Communities in the Twenty-First Century*, 25 Fordham Urb. L.J. 673 (1998).

two will feel disenfranchised with the process and, most likely, the result.

Within these musings, I can only reflect upon and concur with the notion that community input is ever so important and must be made meaningful. The particular ways by which we achieve that I will leave for the future insight and consideration of others.⁹⁰ Whatever those answers, both the topic and the workings of our small group highlighted for me the absolute value and necessity of meaningful collaboration with the communities with which we work.

CONCLUSION

Professor Tremblay's article, as amplified by the small group discussion at the Fordham Conference, provides much to consider and applaud, much to stimulate thought, and a bit to contest. Often, one is assured of the rightness of one's position when it is contrary to that of another with whom one generally disagrees. Here, however, I did not have that luxury and, indeed, wondered about the soundness of my views when they did not jibe with Professor Tremblay's. I can only hope that my brief musings here make a modest contribution to this important issue.

90. The ways in which meaningful group input is achieved might well benefit from a perusal of the legal literature on group representation, a project beyond the reach of this essay. Stephen Ellmann's helpful article, *supra* note 10, made that connection clear to me.